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TO: U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
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RE: State/AR-01/96

FROM: Connaught Marshner,
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Comments on *22 CFR 96*

As someone who has been researching various aspects of adoption, including intercountry adoption, for more than a decade in my role as author and consultant to various national organizations, and especially in view of the time spent researching, talking to experts and editing material for *Adoption Factbook III*, a 637-page compendium published by the National Council For Adoption in 1999, I believe my Comments may be of use to the Department because I approach the issues from an objective viewpoint. Indeed, part VIII of the *Factbook* -- "Intercountry Adoption Issues, contains 31 pages of essays.

Background.

As the Department is aware, the draft Regulations that have been published for Comment are the result of several years of activity related to intercountry adoption issues. Historically, US citizens adopted children from other countries because they were orphans of war. Limited changes to US law were focused on these children. It is only recently that children at risk because of economic, social or other factors were also seen as appropriate subjects of intercountry adoption, by US citizens and those in other first world nations. It was at this point, when the numbers of children began to increase and the children were increasingly not "full orphans" with both parents deceased, that objections began to be raised about intercountry adoption. Some international organizations, including interest groups within the US, began to argue against intercountry adoption as "strip-mining" the human resources of poorer nations. A debate was joined between those who preferred in-country care, including orphanage living, as a solution for children at risk to those who wanted to proceed with intercountry adoption while continuing to seek domestic solutions wherever possible. The situation was complicated by disagreements about trans-ethnic adoptions, with most of the social work field arguing against such adoptions, and a minority of social work professionals, and especially adoptive parents, supporting such adoptions. Furthermore, the occasional incident involving improper payments, trafficking, etc., gave support to those who would

shut down intercountry adoption altogether. Because of the international nature of the issue, multiple explorations and discussions took place at the UN and in other international conferences. The most important of these discussions had to do with the UN Convention on the Rights of the Child. In that context, an odd juxtaposition of interests – those nations and NGOs who opposed intercountry adoption and those nations with majority populations who were Muslim, and who therefore did not recognize any form of adoption – came together. The resulting language found in the 1989 Convention on the Rights of the Child suggested, in essence, that if intercountry adoptions were to take place at all, they should be allowed only after all other options, including institutional care, had been exhausted. The Hague Conference on Private International Law then undertook the task of drafting a Convention on Intercountry Adoption, to provide very detailed instructions on how Intercountry Adoption was to be addressed. The US was an active participant in the meetings that followed from 1990 to 1992, culminating in the Diplomatic Session of 1993 where the Intercountry Adoption Convention was promulgated. The US interests were: first, assure that intercountry adoptions are handled in an honest and transparent manner; second, assure that such ethical adoptions could be expedited so as to respond to urgent humanitarian needs of children at risk; third, emphasize that family care is to be preferred over non-family care, including foster care and institutional care, including family care achieved through intercountry adoption; fourth, set up systems so that nations and the adoption groups within nations could regularly and efficiently cooperate in achieving the goals of the Convention. Although the collaborative drafting process did not result in the US achieving each and every one of its goals, the 1993 Convention was sufficiently helpful that the US moved to implement the Convention. Legislation, including implementing legislation, was drafted. Eventually, the Congress put its own stamp on the contents and the Senate approved the treaty and the Congress passed the Intercountry Adoption Act. The next step, of course, was the drafting of Regulations to implement the new law and the two sets of Regulations before the US at this time are the first stage of getting the US to a place where it has regulations and systems in place so that when the US deposits its instrument of ratification at The Hague, a seamless transition can take place between the pre-Hague Convention processes and the Hague Convention processes. I recited this brief history to remind the Department that a set of expectations was present from the outset, and that those expectations involve many different – and at times competing – interests.

My Comments are arranged like the Regulations. First I comment on aspects of the Preamble and next on the Regulations themselves.

Quality of services provided by agencies and persons. See p. 54066, column 3. One of the major reasons why adoptive parents and their organizations agreed to see the Convention go forward in the US Congress was the desire to reduce the incidence of poor services provided by agencies and persons. The public record, especially in the media, is full of stories of agencies and persons (usually attorneys) doing a bad job with domestic and intercountry adoption services. Money is lost. Delays are commonplace. Children are misrepresented. And when prospective adoptive parents or adoptive parents complain, the result is that it does no good, even when people complain to state licensing

officials. An article from *US News & World Report* entitled "The Adoption Maze" by Kim Clark and Nancy Shute said: "Government officials rarely treat their complaints seriously. Bill Lee, Maryland's adoption licensing coordinator, says when he gets complaints from adoptive parents about money, he makes a courtesy investigative phone call but can do nothing more: "We toss 'em" The state's regulations don't cover such contract disputes, he explains." Maryland is not the only state that essentially ignores complaints. Most states, like Maryland, have had no real role in intercounry adoption for at least 20 years. And now, with their agendas crowded with problems involving many more children – hundreds of thousands of children in foster care, a foster care crisis, over 100 US children awaiting adoption, it is understandable why states pay little or attention to intercountry adoption. It is an area where the states have little expertise, few staff to devote to the issue – and a decidedly mixed record when the states do try to regulate. Because intercountry adoption often involves more than one state, there is a logical need to address issues at the national level. That is why national accreditation of agencies and persons makes sense. What does not make sense is the move by Congress, no doubt at the insistence of some agencies and persons who would like to avoid effective accreditation, that states could accredit agencies and persons within their borders. This is seen as initially ineffectual, even in the best-case scenario, because the states would have to learn to accredit, set up the necessary system to accredit and hire the requisite staff to do the job. The fear is that the Department, pressured by some in Congress and by state officials, will approve a two-level system of accreditation. One level would be those national accrediting entities who would meet the requirements set out in these Regulations. The other, sub-standard level would be whatever watered-down requirements states can talk the Department into putting into place, supposedly temporarily, for the states. Putting state licensing people in charge of quality control for intercountry adoption when they have demonstrated failure to do so adequately even for adoptions from their own public foster care system is a recipe for failure. And those failures will not just impact children and US citizens but will give critics of intercountry adoption ammunition. The critics can say, "look, agency X in state Y, which was accredited, just had a major scandal. Intercountry adoptions cannot be reasonably regulated so they must be ended."

Temporary accreditation. See page 54071, column two. The Congress made clear that some sort of phase-in system was to be established so that agencies doing "smaller" numbers of placements would have time to do the work to be accredited. For those doing fewer than 100 but more than 50 placements, the grace period was to be one year, and for all others, the grace period was to be two years. The Department has chosen to propose a complicated system which seems at odds with the intent of Congress. If Congress had wanted "temporary accreditation" it could and would have used those words in the law. Instead, the term "registration" is used. And "registration," at least to most people and certainly to those in the adoption agency world, implies much less time and expense than "temporary accreditation." Something less complicated and more cognizant of the needs of small agencies needs to be substituted for the "temporary accreditation" scheme. This is also needed because it is critical to get as many agencies accredited as soon as possible so the Convention can be implemented; adding this set of agencies to the workload is counter-intuitive. If the Department does not receive a workable alternative suggestion to

"temporary accreditation," then the Department should convene a small, representative group of agencies the Congress meant to give a one or two year reprieve to, and draft an alternative "registration" system.

Paying for the Complaint Registry. See page 54075, column three. Setting up a Complaint Registry is a sound idea, but if one wants accountability, then it would be logical for the Department to set the fee and collect the fee itself, rather than putting accrediting entities in the position of collecting monies to create a Compliant Registry that will allow people to file complaints against the accrediting entity. The amount of the fee should be clear. The Department can simply add this new fee to the list of fees it already collects.

Primary providers. See page 54076, column one. The goal of the Department in this instance is laudable. One of the most frustrating things adoptive parents or prospective adoptive parents have to cope with is a lack of accountability. When one first begins to explore intercountry adoption, it's something like "you want a bicycle, go to Wal-Mart or Target and buy one, and there's a guarantee." Children are not like bikes, so when there is a problem, it's not as simple as taking the child back and getting a replacement from the store. What happens is that the adoption provider suddenly acts as if they are a helper to the process, not really responsible for much, because they don't do that much. Problem with a home study? See the home study agency. Paperwork not handled right? Probably you mishandled things with BCIS or State. Travel delayed? Not our fault, it's the country of origin, or the judge, or the orphanage, or someone else. Things bogged down when the family is in the country? Bureaucrats there or things beyond our control, just be patient. Drivers, translators, hotels, orphanage and other officials demanding extra cash? Beyond our control. They are not our employees. Having trouble with accurate medicals for the child? Sorry, but the quality of medical care is so spotty; you can always fly our own doctor in. Misrepresentation of the health of the child, sudden appearance of siblings? We don't and can't be responsible for what our facilitator and people in the country of origin do. And so it goes, on and on, so that at the end, to return to the bike example, the agency or private adoption provider says, "brakes, see the brake people, tires, the tire people, frame, the frame people, sprocket, the sprocket people." The Department's struggle to reach an appropriate level of accountability is worthwhile, as is the Department's wish to get insurance coverage at a level commensurate with the risks that the adoptive family is taking on.

Legal responsibility and Insurance. See page 54077, column three. In order to prevent buck-passing, the Department proposes to have the primary providers assume legal responsibility for the actions of supervised providers in the US and outside the US. This is laudable, but would in many instances require a restructuring of the way agencies currently operate. Many of those helping with the system are free-lance types who do not want to be employed by the agency, or supervised, even if it made sense to do so. And obtaining insurance for their actions is even more challenging. The US, in the midst of its own battle over professional malpractice insurance, and calls for "tort reform," is experiencing, as the Dec. 15 cover story in *Newsweek* proclaims, "LAWSUIT HELL: How Fear of Litigation Is Paralyzing Our Professions." More than clergy, physicians and

law enforcement personnel, the three portrayed on the magazine cover, are involved. There is also the adoption profession. On the one hand, it is not in the best interest of either adoptive parents or agencies to have malpractice insurance premiums get so high that services are no longer available, as continues to happen with physicians. Witness the OB-GYN crisis. On the other hand, if adoptive parents discover after the fact that an expensive, lifelong medical or mental health condition means that someone will have to pay the bills for that child for the child's entire life, they are going to be looking to someone for relief. Their first action will be to turn to the agency and its insurance. But if the agency's insurance, for whatever reasons, provides a maximum benefit of $250,000 – an amount inadequate to pay for a year's residential treatment for a seriously disturbed child – what happens next? Does the situation go to court, the family collects all the assets of the agency after a trial, and the agency is forced into bankruptcy? Certainly, Roman Catholic dioceses have been forced into bankruptcy in settling sex abuse cases. Or does the family turn over custody of the child to the state child welfare agency, putting the burden of financially supporting the child for the rest of the child's life on the taxpayers? These are major, seemingly unsolvable questions. Where, for instance, would adoptive parents see a reasonable malpractice floor being set? $500,00? $1 million? $5 million? Have those parents put on different "hats," and have them serve as board members of agencies and then what would happen? Certainly, the parent/board member would not want to be personally sued for serving on the board of a charity. The answers to these questions, and picking numbers from a widely divergent set of recommendations, is something that the Department must do. This is not an envious task, and perhaps the Department can convene a working group composed of Members of Congress and others to arrive at some reasonable compromise solution. Whatever the compromise, it is certain to displease at least one segment of the legal profession: the trial lawyers. But if the humanitarian service of intercountry adoption is to continue, some compromise must be arrived at.

Suitability of agencies and persons. See page 54082, column two. Adoption involves the most delicate of activities: creating a family, or adding to a family, through the legal process. However, in many instances, agencies and individuals involved are required to meet few, if any, standards to be on the staff of or even run an agency. Imagine if every barber were allowed to run a brain surgery clinic. The Department is to be commended for its move to require disclosure. My suggestion would be to require very broad disclosure, and to require such disclosure going back at least 10 years. For instance, if a five-year timeframe is put into place, what happens when the operators of a current adoption agency were involved 10 years ago in a series of actions that caused them to be fired and to be required to leave the state to set up operations all over again? Not just current activities must be included in the due-diligence efforts.

Accrediting fees and accrediting costs. See page 54096, column one. The Department makes clear that no accrediting entity may make a "profit" from its work. This is important for state officials to keep in mind: they cannot expect to set fees at a level that will anything more than reimburse the state for its costs. Since there is likely to be an advantage for national accrediting entities, in that their overhead costs will be spread over many more agencies and persons, it is difficult to see how states can accredit, and meet

the same standards as national accreditors, and have competitive fees. There will need to be some advantage for agencies to be accredited by their state licensing people. In terms of accrediting costs, the Regulations are silent on a substantive issue. Although the site visit language says "actual costs incurred may be charged for the travel and maintenance of evaluators," nothing is said about whether the evaluators are to be paid or are to be volunteers. The only current accrediting entity relies on volunteers. Does the Department anticipate that entities it approves will rely solely on volunteers? Particularly in the case of state accrediting entities, will the states be able to resist the temptation to pressure agencies and individuals to "volunteer" in return for favorable treatment later on? Is the mere currying of favor with state bureaucrats by volunteering a banned form of conflict-of-interest? There seems to be less opportunity for improper use and assignment of volunteers when national entities are used. Finally, it would seem that the Department might wish to mandate paid evaluators since it has deadlines to meet and since volunteers cannot be held accountable to prepare for, do and report back after site visits. Volunteers may have been seen as feasible in the mid-70s, when the existing human services accrediting entity was established but these are less genteel times and many fewer women, including professional women, have the time or inclination to volunteer. Relying on volunteers would necessarily result in a form of elitism and possible discriminatory exclusion: the Department should consider the profile of the persons with the jobs, background, time and income that allow them to volunteer for a several-day assignment involving overnight travel.

Translation of and time to review medical records. See page 54107, column three. Two weeks to review medical records of a child is minimal and acceptable only if the Regulations are changed so that a third week is added if the records are not provided with a correct and complete English-language translation of all records, reports and materials used to compile the records. The Department should change this, as a major proportion of complaints appear to have to do with medical records and possible misrepresentation of the medical situation of the child to be adopted.

Escorting. See page 54108, column two. In 96.50 (a) and elsewhere the Regulations state a bias against escorting. There are strong arguments to be made for and against escorting which are undoubtedly known to the Department. Please strike the words "and, if possible, in the company of the prospective adoptive parents" at each and every point that such words appear in the Regulations.

Birthparent choice in outgoing cases. See page 54110, column one, 96.54 (a). This language quite properly recognizes that in some cases the birthparent(s) should have the choice of identifying specific prospective adoptive parents. Such "direct placements," usually facilitated by adoption attorneys, are common in US domestic adoptions. However, the language does not give birthparent(s) who may desire to delegate the matter of identification to an adoption agency equal choice. In order not to discriminate against agencies or persons who may be serving such birthparents, the Department should add the following words or their equivalent before the word "or" in line four: "have delegated the task of identifying specified adoptive parents to an agency or person,".